BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

RECEIVED
MAY 28 1996
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of	)	
	)	
Amendment to the Commission's	)	WT Docket No. 95-157
Rules Regarding a Plan for Sharing	)	
The Costs of Microwave Relocation	)	

To: The Commission

DOCKET FILE COPY ORIGINAL

COMMENTS OF THE AMERICAN PETROLEUM INSTITUTE

THE AMERICAN PETROLEUM INSTITUTE

Wayne V. Black
John Reardon
Keller and Heckman
1001 G Street
Suite 500 West
Washington, D.C. 20001
(202) 434-4100

Its Attorneys

Date Due: May 28, 1996

No. of Copies rec'd 0+1
List ABCDE

Table of Contents

SUMMARY

API believes the current negotiation framework is working well and should be retained. API submits that a reduction in the voluntary negotiation period to one year would provide parties interested in negotiating with inadequate time in which to identify their goals, contact the relevant parties, and conclude the complex agreements necessary to effectuate relocation of microwave links. Given the difficulty of closing such a transaction in that short a time frame, the Commission's proposal to restrict the voluntary negotiation period to twelve months could have the unintended effect of postponing commencement of negotiations until the start of the mandatory negotiation period. This policy thus could seriously delay PCS rollout and incumbent-initiated microwave relocations.

API applauds the Commission's tentative decision to permit microwave incumbents to self-relocate their links and to obtain reimbursement from subsequent PCS licensees who would have interfered with those links. Extension of reimbursement rights to self-relocating microwave incumbents will further the FCC's goals of early PCS rollout and systemwide incumbent relocations.

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Amendment to the Commission's	)	**WT Docket No. 95-157**
Rules Regarding a Plan for Sharing	)	
The Costs of Microwave Relocation	)	

To: The Commission

COMMENTS
OF THE
AMERICAN PETROLEUM INSTITUTE

The American Petroleum Institute ("API"), by its attorneys, pursuant to Section 1.415 of the Rules and Regulations of the Federal Communications Commission ("Commission"), respectfully submits these Comments in response to the Further Notice of Proposed Rule Making ("Further Notice") adopted by the Commission on April 25, 1996 concerning the plan for sharing the costs of 2 GHz microwave relocation.

I. BACKGROUND

1. API fully supports adoption of the proposal made by the Commission in its Further Notice, which was previously advocated by API in its Reply Comments,[1/] to apply the Commission prescribed cost sharing mechanism to those incumbents who choose

---

[1/] API filed Reply Comments in this proceeding on January 11, 1996.

to self-relocate. The cost-sharing plan is advantageous to both PCS interests and microwave incumbents because it distributes the costs of microwave relocation more equitably while simultaneously promoting systemwide relocation of incumbent microwave systems. In order to encourage systemwide relocations, microwave incumbents must be accorded cost-sharing rights. In instances where their deployment schedules do not require relocation until a later time, PCS licensees often choose not to negotiate with other PCS licensees and microwave incumbents. In addition, the D, E and F block PCS licensees have not yet been determined. Thus, problems with timing can interfere with systemwide relocations.

2. As API noted earlier in this proceeding, an incumbent might wish to relocate all six links of its six-link system now, but the incumbent may only be offered immediate compensation from one eligible PCS licensee for a portion of its links. The other links may lie in the license areas of other PCS licensees. In order to maintain systemwide integrity, the incumbent will then be forced to choose between relocating the remaining links at its own expense or refusing to relocate any of the six links until a complete solution is offered.

3. If the microwave incumbent chooses to wait until a complete, systemwide relocation offer is presented by PCS licensees, then PCS rollout will be delayed and the incumbent

will languish in a state of uncertainty. If the microwave incumbent chooses to pay for the relocation of its links, the Commission's rules currently do not permit the incumbent to receive for that meritorious action compensation from subsequent PCS licensees who benefit from the early relocation.

4. To rectify this situation, the Commission proposed to adopt a cost-sharing plan that permits long-term retention of interference rights for microwave links which are self-relocated by an incumbent. Incumbents would then be encouraged to relocate their entire system even when presented with offers for only portions of their system. Subsequently, when a PCS licensee seeks to commence operations which would have interfered with that self-relocated link, that PCS licensee would reimburse the microwave incumbent for the reasonable cost of the early relocation. Like the PCS-to-PCS cost-sharing plan, the amount of reimbursement should be subject to the reimbursement cap. Also like the PCS cost-sharing plan, -- where depreciation is not applied to PCS relocators who relocate a link outside their service area or frequency band -- depreciation should not be applied to incumbents that self-relocate. Incumbents, in fact, should be treated simply as incumbents, subject to full reimbursement by the subsequent PCS licensee, who in turn would be designated the PCS relocator.

II. COMMENTS

A. The Voluntary Negotiation Period Should Remain Two Years

(i) The Existing Framework Is Sound

5. Based on the experience to date of many API members, API believes that a one year voluntary negotiation period would provide parties with insufficient time in which to: (1) develop their relocation goals; (2) identify incumbents that need relocation; (3) formulate their negotiation strategies; (4) commence a dialogue; (5) conduct complex engineering analyses and cost/benefit analyses of the existing systems; (6) analyze alternative replacement systems from both a cost and comparability standpoint; (7) make offers/counteroffers; (8) draft an agreement; and (9) conclude and execute an agreement. The Commission was wise to allow parties two years in which to freely negotiate, because it may take as long as two years to resolve the myriad issues involved with such a complex undertaking as systematic relocation.

6. Nearly fifteen months into the voluntary period for the A and B block PCS licensees, many incumbents and PCS licensees are just now reaching agreements. Most of these agreements are the result of several months of studying the incumbent systems located within an MTA and exploring discussions

with several of those incumbents in order to derive the best result possible for the PCS licensee's new system. In addition, it often takes incumbents several weeks to prepare for negotiations and analyze alternative replacement systems. Thus, the Commission should recognize that even before the two sides sit down at the bargaining table, they normally spend several weeks and months identifying their needs and preparing for the initial negotiation. At the very least, in API's view, two years is required to ensure that those parties that wish to conclude a voluntary agreement have sufficient time in which to negotiate such an agreement.

7. The two year period should be retained for C block licensees because they placed bids with the expectation that the two year voluntary period would govern their negotiations. The Commission may also wish to consider whether providing licensees in the D, E and F block with a different negotiation framework treats all licensees in an equitable manner; if the A, B and C block licensees were subject to two year voluntary negotiation cycles but subsequent licensees obtain a one year voluntary period, the subsequent licensees may receive a benefit which was unavailable to former licensees. That benefit is the reduced ability of incumbents to request financial reimbursement in exchange for early relocation. If an incumbent can abstain from negotiations for one year only, its ability to negotiate is reduced vis-a-vis the incumbent that could abstain from

negotiations for two years. Because this incentive sometimes translates into payments from PCS providers to incumbents in exchange for early relocation, the new PCS licensees would receive a significant cost benefit which was unavailable to the previous PCS licensees.

8. Just as importantly, incumbents that are contacted by a PCS licensee operating under a one year voluntary period would be forced to disrupt their businesses and enter negotiations one year earlier than under the existing rules. These incumbents would lose much of their existing incentive to relocate early. Instead, API hypothesizes that many incumbents would simply forego negotiations during the one year voluntary period and wait until the mandatory period -- particularly since it is very difficult to reach an agreement within just one year, as discussed above. If that scenario occurs, then many parties would not even initiate preliminary discussions until after one year into the three year negotiation framework. Paradoxically, the Commission's effort to hasten negotiations by altering the negotiation framework may actually delay the majority of potential negotiations until the commencement of the least common denominator, the two year mandatory period.

(ii) The Commission Needs to Establish Consistency

9. API commends the Commission for adhering to its rules in the First Order concerning the voluntary negotiation process. API also applauds the Commission's preservation of the ability of microwave incumbents and PCS licensees to negotiate for incentive payments in exchange for early relocation or incumbents foregoing Commission-mandated rights.

10. Despite API's strong approval of both the Commission's First Order and its Further Notice, API is opposed to the Commission's suggestion to revisit the rules which established the time frames for the voluntary and involuntary periods in the C, D, E and F blocks of the PCS proceeding. API believes that only through the Commission's issuance of a strong statement supporting its existing rules and consistent adherence to those rules can the Commission avoid repeating the PCS cost sharing fiasco, wherein PCS trade associations waged an unprecedented campaign against incumbents' fundamental relocation rights during a proceeding that was intended to focus on cost sharing issues alone. If the Commission sends the wrong message to some PCS licensees-- that fundamental relocation rules are susceptible to change midstream -- then the Commission will subject itself and future services, including the Mobile Satellite Service, to a relentless round of grievances by newly-licensed auction winners who are suddenly unhappy with their

status and the basic rules established for negotiation and compensation of incumbents.

11. In the case of Emerging Technologies, the relocation rules are created at a time when no Emerging Technologies licensees are identified. These relocation rules are a compromise between prospective service providers, who want the spectrum, and identifiable incumbents, who hold licenses for use of that spectrum. After the relocation rules are adopted by the Commission, the auction occurs and licenses are awarded. At this point, identifiable licensees exist on both sides. It is no coincidence that this is the moment when complaints arise from those newly-licensed parties concerning their obligation to pay incumbents and negotiate over a short, three year time period. Before, those PCS licensees had no identifiable obligations as prospective bidders; now, they owe money to the Commission and must relocate incumbents. Their burden is suddenly very real. Since they must pay the Commission, there is only one way to alleviate their situation: attack those existing rules that protect incumbents.

12. Unless the Commission stands firmly behind its current relocation rules, it will create a self-perpetuating cycle of auctions, licensing, complaints, and rule makings for each service to be auctioned. Not only is the delay and expense of such regulatory battles counter-productive, but, in addition,

the goals of relocation and rollout are thwarted. Ongoing negotiations stall as both sides wait to see how their rights and responsibilities will be affected, if at all, by the ongoing rule making. Licensees slow their rollout, hoping for more advantageous treatment in the near future. The only winners in such a scenario are attorneys and trade associations, -- not the incumbents, not the Emerging Technologies providers themselves, and certainly not the American public, which deserves less delay and more services.

B. The Commission Should Treat Incumbent Self-Relocators As if They Are PCS Licensees Relocating Links Outside Their Geographic Service Area or Frequency Band

(i) Adjacent Channel Interference Should Be Included

13. The Commission permits PCS relocators who relocate a link outside of their geographic area or outside of their frequency block to obtain **full reimbursement even though the link presented adjacent channel interference**, rather than co-channel interference. First Order, Appendix A, at ¶ 16. The Commission concluded that in those instances, trying to determine whether the link is truly non-interfering would be administratively burdensome. First Order, Appendix A, at ¶ 16. Thus, the Commission allows full reimbursement of compensable costs, up to the cap, if the PCS relocator relocates a link that is fully outside its licensed frequency band or geographic area.

14. The same treatment should be afforded microwave incumbents that self-relocate their own links. The clearinghouse should not be burdened with the task of determining whether a particular link presented adjacent channel or co-channel interference. In order to trigger a reimbursement obligation, it should be sufficient that the interference would have existed, and that the link was relocated.

(ii) Depreciation Should Be Excluded

15. The cost sharing formula amortizes the cost of relocating a link over a ten-year period so that the amount the PCS relocator receives in reimbursement depreciates over time. The Commission determined that depreciation begins on the date that the PCS relocator signs a relocation agreement with a microwave incumbent. This depreciation policy makes sense in the PCS context because it recognizes that PCS relocators benefit from the relocation of a link which is in their service area or frequency block. However, in its First Order, the Commission altered its depreciation policy by stating:

> when a PCS provider relocates a link wholly outside its service area and/or spectrum block -- which would entitle it to full reimbursement of compensable costs up to the cap -- that such reimbursement should not be depreciated under the cost-sharing plan. We believe that this addition to our original proposal will encourage PCS licensees not to delay relocations in the hope that other PCS entities will relocate these links.

First Order, Appendix A, at ¶ 17.

16. Microwave incumbents deserve the same treatment because they are relocating links in geographic areas and spectrum blocks for the benefit of third party PCS licensees. Rather than wait "in the hope that other PCS entities will relocate these links", this approach would encourage incumbents to self-relocate the links. First Order, Appendix A, at ¶ 17.

17. If the Commission applies the depreciation aspect of its cost-sharing formula, then incumbents would have little or no incentive to self-relocate. Like the PCS licensee that relocates links outside its service area or frequency block, incumbents do not benefit from being the first to market when they self-relocate a link. The first PCS licensee to interfere with the self-relocated link should be treated as the initial relocator, and depreciation should not lessen the reimbursement amount which is due to the microwave incumbent.

C. The Cost Sharing Formula Should Not Punish Incumbents For Self-Relocating Links

(i) Incumbents Should Be Entitled to Full Reimbursement From PCS Relocators

18. The Commission requested comment on whether to treat the incumbent who self-relocates as the initial relocator under the cost sharing plan. Under the cost sharing plan, if an incumbent who self-relocates were treated as an initial relocator, then the incumbent would receive only a fraction of its relocation cost, rather than the full cost of that

relocation. For example, Appendix A of the First Order calculates that if the initial relocator pays $210,000 to relocate a link, and a subsequent licensee files a PCN one year later, then the subsequent licensee would pay only $94,500 to the initial relocator. The $21,000 difference between half of the relocation cost ($105,000) and what is actually paid ($94,500) is due to depreciation. As explained above, depreciation should not be included for microwave incumbents, just as it is not included for PCS licensees who relocate links outside their geographic areas or frequency bands.

19. Assuming that depreciation were not included, the cost sharing formula would still only provide the relocator with half of the relocation cost, which in the example posed would be $105,000. This is because the formula assumes that the relocator still holds half the benefit of the relocation, -- it is providing PCS service on that spectrum or in that geographic area. A microwave incumbent, however, is not providing service; instead, it has constructed an alternative facility and requires full reimbursement for that cost. Thus, the microwave incumbent should be entitled to full reimbursement for self-relocated links. In the example above, the incumbent should receive the full, reasonable cost of relocation ($210,000) from the first PCS entity that would have caused interference to the link had it not been relocated. Then, that PCS entity would become the PCS relocator, and the normal cost sharing formula would apply, so

that a subsequent licensee would reimburse the PCS relocator pursuant to the regular cost sharing formula.

(ii) The Risk of Unreimbursed Self-Relocation is a Sufficient Incentive to Keep Incumbent Relocation Costs at a Minimum

20. The Commission requested comment on whether a self-relocating incumbent would have adequate incentive to minimize relocation costs if the incumbent possessed the potential to recover those costs from subsequent PCS licensees. API believes that the risk of self-relocation is more than sufficient incentive to induce incumbents who initially pay for their own relocations to minimize relocation costs. A self-relocating incumbent pays for its relocation without any assurances that a later PCS licensee will interfere with the relocated link and thereby trigger reimbursement rights for the self-relocating incumbent. The risk of unreimbursed self-relocation is more than adequate to ensure that self-relocation costs will be minimized.

21. Should the Commission, however, determine that a specific cap on reimbursement is necessary, API submits that the Commission should simply limit reimbursement for self-relocated links to the $250,000 per link figure adopted in the cost-sharing proceeding, plus $150,000 for a new tower, where needed. Incumbents that self-relocate will have every incentive to document their relocation costs thoroughly, since the incumbents

themselves initially incur those costs. API points out that this $250,000 cap is conservative, particularly since it does not reflect the value which self-relocation provides to the PCS industry in the form of foregone negotiation costs. Nor does the $250,000 cap offset the risks borne by self-relocating incumbents who may never receive reimbursement for one or more self-relocated links.

(iii) Transaction Costs Should Be Reimbursed

22. The Commission's cost sharing plan prevents relocators from recovering more than two percent of the incumbent's transaction expenses. This restriction on the reimbursement of transaction costs corresponds to the restriction the Commission adopted with respect to PCS reimbursement of incumbent transaction expenses during **involuntary** relocation, except that for purposes of cost sharing, the cap of two percent of hard costs applies regardless of whether the relocation occurred during the **voluntary, mandatory or involuntary** period. First Order at ¶ 21. This policy prevents subsequent PCS licensees from being forced to pay for the "premium" costs which were paid by relocators in exchange for the benefit of early rollout.

23. In the case of a microwave incumbent that self-relocates, however, the Commission should treat self-relocation as a voluntary or mandatory relocation and thereby permit the

initial PCS licensee to reimburse the incumbent for its reasonable transaction costs above the two percent cap. In this way, the first PCS licensee to offer service that would have interfered with the link, had the incumbent not self-relocated, is designated the PCS relocator in a voluntary or mandatory relocation, and all reasonable transaction costs are reimbursed.

III. CONCLUSION

24. By allowing incumbents to obtain reimbursement rights from subsequently identified PCS licensees, the Commission would further the goals of early rollout of PCS and systemwide relocation of incumbents. The cost-sharing plan, with some minor modifications, should apply to microwave incumbents that self-relocate links.

WHEREFORE, THE PREMISES CONSIDERED, the American Petroleum Institute respectfully submits the foregoing Comments

and urges the Federal Communications Commission to act in a manner fully consistent with the views expressed herein.

Respectfully submitted,

THE AMERICAN PETROLEUM INSTITUTE

By: 

Wayne V. Black
John Reardon
Keller and Heckman
1001 G Street
Suite 500 West
Washington, D.C. 20001
(202) 434-4100

Its Attorneys

Date Due: May 28, 1996

API believes that the financial risk involved with self-relocation is a sufficient incentive to minimize incumbent self-relocation costs. However, should the Commission determine that a concrete limit is necessary, then API respectfully submits that the Commission should apply a cap of $250,000 per link, plus $150,000 in those instances where a constructed tower is involved.